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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT WILLIAM REED,

Defendant and Appellant.

F075285

(Tuolumne Super. Ct. No. CRF50066)

OPINION

APPEAL from a judgment of the Superior Court of Tuolumne County. Kevin M. Seibert, Judge.

Kent D. Young, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Michael Dolida, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant/defendant Robert William Reed was driving a vehicle that went through a stop sign and police officers initiated a traffic stop. The officers determined defendant was driving a stolen car. During the search of the car, the officers found approximately 37 grams of methamphetamine and 20 clonazapam pills under the front passenger seat. Defendant was in possession of over $1,000 cash in various denominations. Defendant said he did not know the car was stolen or that the drugs were under the seat.

After a jury trial, defendant was found not guilty of receiving stolen property, the vehicle. He was convicted of transportation for sale and possession for sale of methamphetamine, possession for sale of clonazepam, and possession of narcotics paraphernalia. He was placed on probation.

On appeal, defendant contends the criminalist who tested the methamphetamine and clonazepam found in the car relied on inadmissible testimonial hearsay, the introduction of her testimony was prejudicial, and his convictions must be reversed. Defendant further argues the trial court had a sua sponte duty to instruct on simple possession as lesser included offenses of possession for sale of methamphetamine and clonazapam. Finally, defendant challenges two of the terms imposed as conditions of his probation. We affirm.

FACTS

The stolen car

In March 2016, Carol Ann Miller owned a 1994 Buick Regal that needed repairs. Ms. Miller left her car with Daniel Broadway, an acquaintance, who said that he could perform the repairs; she paid him for parts. On or about April 1, 2016, Broadway told Ms. Miller that he had broken a key in the ignition and it also needed repair.

After repeated requests, Broadway failed to return the car to Ms. Miller, refused to tell her where the car was, and kept avoiding her.

On or about April 11, 2016, Ms. Miller reported to the police that the Buick had been stolen.

The traffic stop

On the morning of April 20, 2016, Sergeant Rogers of the Sonora Police Department was in his marked patrol car. He was parked near the intersection of Hope Lane and Lyons Street to monitor the area because there had been recent complaints that drivers were running through the stop signs.

At approximately 8:12 a.m., Sergeant Rogers saw a Buick Regal traveling on Lyons Street that failed to make a complete stop and continued through the intersection. Rogers followed the car and determined it was traveling 35 to 40 miles per hour in a zone that was marked 25 miles per hour.

Sergeant Rogers informed dispatch that he was conducting a traffic stop and checked the license plate number. Rogers was advised the vehicle had been reported stolen.

Sergeant Rogers and Officer Bowley conducted a felony traffic stop of the stolen car. The driver pulled to the side of the road, and the officers ordered the occupants to get out.

Defendant was in the driver's seat, and codefendant Daniel Oliver was sitting in the front passenger seat.

Search of the car

The officers searched the stolen vehicle. Sergeant Rogers testified he found one glass smoking pipe on top of the front seat. Rogers opened the lid of the center console compartment, between the front seats, and found two more glass smoking pipes. Rogers testified the pipes could be used to smoke methamphetamine and/or marijuana.

Officer Bowley testified he found a pouch under the front passenger seat that appeared to contain methamphetamine. He placed the pouch on the hood of the car and alerted Sergeant Rogers.

Sergeant Rogers testified that he opened the pouch and found six plastic bags; each bag contained a white crystal-like substance that appeared to be methamphetamine. The pouch had another plastic bag that contained 20 small, blue pills. A separate plastic bag contained several smaller plastic bags that were empty; these empty bags were similar to the kind used to package controlled substances.

Sergeant Rogers found a backpack in the rear of the vehicle, and it contained a bag of apparent marijuana.

Sergeant Rogers found a ring of keys inside the Buick. There were multiple GMC keys and one key with a broken tip. Rogers testified there were lots of papers in the glove box; he found a bill of sale in defendant's name for a travel trailer but not for the Buick.[1]

Arrest and search of defendant

Sergeant Rogers arrested both defendant and Oliver at the scene of the traffic stop.

Sergeant Rogers searched defendant and found $1,138 in cash in his wallet consisting of one $100 bill, forty-six $20 bills, eleven $10 bills, one $5 bill, and three $1 bills.

Sergeant Rogers searched codefendant Oliver and did not find any cash or contraband.

Defendant's postarrest statements

At the jail, Sergeant Rogers advised defendant of the warnings pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, and he agreed to answer questions.

Defendant said he bought the Buick from "Danny" for $600 on April 5, 2016. Defendant picked it up at Danny's apartment, located in the general area of Sparrow Lane

[1] Ms. Miller subsequently recovered her car and testified it was drivable, but the ignition was damaged. She looked through the papers in the glove box and found a bill of sale and a release from liability for the Buick. Ms. Miller testified she did not sign the documents, and her signature had been forged.

in Sonora, but he was unable to give an address or telephone number, and he was not sure about Danny's last name. Defendant said he did not have title to the car because it belonged to Danny's mother.

Sergeant Rogers asked defendant about the narcotics and paraphernalia found in the car. Defendant said he had no knowledge of the items.

Sergeant Rogers asked defendant about the large amount of cash that he was carrying. Defendant said he earned the money by doing odd jobs for his father. Rogers asked for his father's address and telephone number. Defendant said he did not know his father's address or telephone number, but generally knew where he lived in Columbia.

The criminalist's testimony[2]

Megan Gallagher, a criminalist in the Department of Justice's Central Valley Crime Laboratory in Ripon, testified she tested the six bags of suspected methamphetamine. She determined that each bag contained methamphetamine with the following net weights: item one was 0.615 grams; item two was 15.373 grams; item three was 13.850 grams; item four was 1.259 grams; item five was 0.708 grams; and item six was 5.667 grams.

Gallagher tested one of the 20 tablets that were submitted for testing. The tablet contained clonazepam. She did not weigh the tablet, but the inscription marked on it stated it was a one-milligram clonazepam tablet.

Gallagher testified that another item was submitted for testing, with the indication that it contained suspected marijuana. Gallagher did not open that package or test the contents because "[w]e triage our cases … if it looks like it's under an ounce of

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[2] Defendant contends his narcotics convictions must be reversed because the criminalist's testimony was based on inadmissible and testimonial hearsay that the substances submitted for testing were associated with defendant and codefendant Oliver. In parts I and II, *post*, we address the relevant testimony in detail and reject defendant's contentions.

marijuana, then we don't analyze it since that's a misdemeanor. That's our department policy" unless the Department of Justice (DOJ) is advised about a pending sales charge or specifically asked to test it.

Expert testimony

Sergeant Serrano of the Tuolumne County Sheriff's Department testified as a prosecution expert about "possession of narcotics, specifically methamphetamine and clonazepam sales."[3]

Sergeant Serrano testified that methamphetamine usually had a street value of $10 for a tenth of a gram, which amounted to $100 for one gram. It was very common to smoke it through a pipe, and there were different kinds of pipes for that purpose. A pipe with a white crystalline substance inside would be consistent with being used to smoke methamphetamine.

Sergeant Serrano testified that people who sell drugs commonly carry more than one type at the same time and will often try to hide the narcotics in vehicles.

The prosecutor asked Sergeant Serrano a hypothetical question about a traffic stop where the driver had $1,138 in cash in certain denominations; the search of the car revealed methamphetamine pipes; a pouch was under the front passenger seat contained a bag with 20 clonazepam pills; a bag in the pouch contained six separate baggies of methamphetamine with weights similar to those found in this case, for a total of 37.472 grams; and marijuana was in a backpack located in the back seat.

Sergeant Serrano testified that, based on his training and experience, he believed the methamphetamine was possessed for the purposes of sale. The total weight of 37 grams was significant and too large a quantity for someone to carry for personal use. The total weight amounted to "roughly 370 uses" with a street value of approximately $3,700.

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[3] The court granted the prosecutor's motion to designate Sergeant Serrano as an expert; defendant did not object.

Serrano explained that "no one wants to catch a sales case. Nobody wants to walk around with that kind of dope on them, that amount." The packaging and the amount of cash was also significant and consistent with possession for sale.

Sergeant Serrano testified to his opinion that the clonazepam was also possessed for sale, based on the packaging of the pills in a small baggie instead of a labeled prescription bottle. It was significant the pills were in the same pouch as the methamphetamine because "drug dealers commonly keep all of their stuff together."

Sergeant Serrano testified that someone who sells drugs may also possess drugs for their own personal use.

On cross-examination, Sergeant Serrano was asked if his opinion would change if the vehicle had been sold to the driver by Daniel Broadway, it had been reported stolen by the owner, and the pouch with the drugs was found under the front passenger seat. Serrano testified his opinion that the drugs were possessed for purposes of sale would not change based on the amount of drugs and the cash that was found on one person. It was very common to hide drugs under seats or in compartments.

DEFENSE EVIDENCE

Defendant testified at trial that he met Daniel Broadway through codefendant Oliver. He bought the car from Broadway and did not know it was stolen. Broadway gave him a bill of sale on March 30, 2016. Defendant picked up the car on the morning of April 20, 2016, after he made the final payment for it. Broadway gave him a broken key. Defendant realized the key had already broken off in the ignition, but he was not concerned about that.

Defendant testified he was taking the car for a test drive with Daniel Oliver when the police stopped him. He did not know there were methamphetamine and clonazepam in the car until the police found the narcotics. He admitted the marijuana and the pipe on the driver's seat belonged to him, and he used the pipe to smoke marijuana. He did not know about the pipes in the center console and had never opened it.

Defendant testified he earned the cash from working at a market and trimming trees with his father in Columbia. He did not know his father's telephone number, but it was stored in his cell phone, and the arresting officers would not let him look at the phone to retrieve the number.

Defendant had a prior conviction for unlawful possession of a firearm in 2007 (Pen. Code, § 12021, subd. (c)(1)).

Charges and convictions

Defendant was charged with count I, receiving stolen property, a motor vehicle (Pen. Code, § 496d, subd. (a)).

Defendant and codefendant Oliver were jointly charged with count II, transportation for sale of a controlled substance, methamphetamine (Health & Saf. Code, § 11379, subd. (a)); count III, possession for sale of a controlled substance, methamphetamine (Health & Saf. Code, § 11378); count IV, possession for sale of a designated controlled substance, clonazepam (Health & Saf. Code, § 11375, subd. (b)(1)); count V, misdemeanor possession of paraphernalia used for smoking a controlled substance (Health & Saf. Code, § 11364, subd. (a)); and count VI, the infraction of possession of marijuana (Health & Saf. Code, § 11357, subd. (b)).

On November 21, 2016, the joint jury trial began for defendant and Oliver.

On November 22, 2016, defendant was found not guilty of count I, receiving stolen property, a motor vehicle. Defendant was convicted of the narcotics offenses in counts II through VI.

Codefendant Oliver was found not guilty of all charges.

Sentencing

On March 8, 2017, the trial court adopted the probation department's recommendation and placed defendant on probation. In doing so, the court overruled the prosecutor's argument that defendant should be sentenced to prison.

The court suspended imposition of sentence for five years and placed defendant on probation under certain terms and conditions, including service of one year in jail; not to possess any controlled substance without a prescription from a medical doctor; not to possess any drug paraphernalia; to register as a narcotics offender; and to submit to drug and/or alcohol testing at the direction of the probation officer or at the request of any peace officer. Defendant was also ordered to "[s]ubmit your person and property, including any residence, premises, container, electronic device, or vehicle under your control to search and seizure at any time of the day or night by any law enforcement or probation officer with or without a warrant."

On March 20, 2017, the court found defendant's conviction in count VI, possession of marijuana, was no longer a chargeable offense and dismissed the infraction on its own motion.

DISCUSSION

I. The Criminalist's Testimony About the Methamphetamine

Defendant contends he was deprived of his Sixth Amendment right to confront and cross-examine witnesses when Gallagher, the criminalist, testified that she tested the six bags of methamphetamine, and the evidence was associated with defendant and codefendant Oliver. Defendant's argument is based on Gallagher's trial testimony that an "unknown officer" filled out the DOJ form that accompanied the suspected narcotics, and that the unknown officer wrote that the suspected narcotics were associated with defendant and Oliver.

Defendant asserts Gallagher's expert testimony constituted inadmissible hearsay that was testimonial and introduced for the truth of the matter – that the six packages of methamphetamine were the items that were associated with defendant and Oliver, and thus seized from the stolen car at the time of defendant's arrest. Defendant argues that his constitutional rights were violated by Gallagher's testimony because he was "never afforded an opportunity to confront and cross-examine the unknown officer" who

submitted the substances for testing, in violation of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*).

Defendant further argues the error is prejudicial and requires reversal of his convictions because there was no other evidence that the items found in the stolen car were associated with him or tested positive.

A. Sanchez

Defendant's hearsay arguments are based on *Sanchez, supra*, 63 Cal.4th 665, where an officer testified as a gang expert about general gang culture, and specifically about statements the defendant had made to other officers about his gang affiliation. The expert relied on defendant's statements that were in reports prepared by other officers, and gave his opinion that defendant was a member of a criminal street gang. On appeal, the defendant argued the admission of the expert's testimony about the contents of the records created by other officers was testimonial hearsay and violated *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). (*Sanchez, supra*, 63 Cal.4th at pp. 672–674.)

Sanchez held that when "an expert relies on hearsay to provide case-specific facts, consider the statements as true, and relates them to the jury as a reliable basis for the expert's opinion, it cannot logically be asserted that the hearsay content is not offered for its truth…." (*Sanchez, supra*, 63 Cal.4th at p. 682.) *Sanchez* reviewed the plurality opinion in *Williams v. Illinois* (2012) 567 U.S. 50 and found that it "call[ed] into question the premise that expert testimony giving case-specific information does not relate hearsay…." (*Sanchez, supra*, 63 Cal.4th at p. 683.)

Sanchez held that "[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay…." (*Sanchez, supra*, 63 Cal.4th at p. 686.) Factual assertions are "case-specific" if they relate to "the particular events and participants alleged to have been involved in the case being tried." (*Id.* at p. 676.)

> "What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, *unless they are independently proven by competent evidence* or are covered by a hearsay exception…." (*Sanchez, supra,* 63 Cal.4th at p. 686, first italics in original, second italics added.)

Sanchez further held that such evidence violated the confrontation clause, as interpreted in *Crawford*, "[i]f the case is one in which a prosecution expert seeks to relate *testimonial* hearsay [as the basis for his or her opinion], there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez, supra,* 63 Cal.4th at p. 686.) "Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony." (*Id*. at p. 689.) Information contained in a police report is generally construed as testimonial hearsay because police reports "relate hearsay information gathered during an official investigation of a completed crime." (*Id*. at p. 694.)

With this background in mind, we turn to the trial evidence about the chain of custody of the items that were tested by Gallagher.

B. Trial Testimony

Defendant's hearsay arguments must be considered in the context of the entirety of the trial testimony from both Gallagher and Sergeant Rogers.

As set forth above, Officer Bowley testified he found a pouch under the front passenger seat that appeared to contain methamphetamine. He placed the pouch on the hood of the car and alerted Sergeant Rogers. Rogers testified that he opened the pouch and found six plastic bags that contained a white crystal-like substance that appeared to be methamphetamine; a bag with 20 small, blue pills, and another bag that contained empty plastic bags.

Sergeant Rogers testified that he took possession of the suspected narcotics that were found in the stolen car at the scene of the traffic stop.

"[THE PROSECUTOR]: Did you take possession of the substances that you believed were controlled?

"[ROGERS]: Yes.

"Q: And what did you do with them?

"A. They were transported back to the Sonora Police Department where I conducted a field – called a field NIK test, which is a test basically where a substance is put into a chemical compound, and you follow instructions on the instruction manual of – of how to – how to perform the test, and then it should be a certain color that pops up if it's the narcotics that you are suspecting that it is.

"Q. Okay. After you tested it, did you also weigh the substances?

"A. Yes.

"Q. Okay. And after you do that, do you then seal the substances in any way?

"A. Yes.

"Q. Can you describe that?

"A. When you confiscate narcotics, they have to be placed into a specific envelope that the California Department of Justice supplies to departments. The reason being, all suspected controlled substances eventually get sent to the Department of Justice for examination and for testing. They –they are put into that – to that bag and then there's proper – there's procedures that they require before they receive the bag. There's portions of the bag that have to be filled out. There's certain information you as the booking officer writes on the bag. The bag is sealed with tape. Then you then initial the tape putting your initials half on the tape and envelope to show that seal is genuine, it's not been tampered with prior to the Department of Justice receiving it.

"Q. Part of the information, does it identify who the suspects were that the drugs were related to?

"A. Yes.

"Q. And does it have your case number?

"A. Yes."

On cross-examination, defense counsel questioned Sergeant Rogers about where the contraband was found in the stolen car. He did not ask Rogers any questions about how he took possession of the suspected drugs or processed the items for testing.

After Sergeant Rogers testified, Gallagher testified as the prosecution's expert on how the substances were tested. Gallagher began her testimony with a general description of how the DOJ laboratory receives items for analysis.

> "[THE PROSECUTOR]: [J]ust what is a BFS case number?
>
> "[GALLAGHER]. When a case comes into our laboratory, is submitted, it's given a BFS case number. The unique number pertaining to that specific case that we refer to our laboratory system. It ties to the agency case that submits it.
>
> "Q. So when you – how does the lab receive a case?
>
> "A. Cases are submitted either by somebody coming and dropping them off or sending them via FedEx or UPS, so they come into the property department and our property controllers log the cases into our lab system.
>
> "Q. And are there specific envelopes or ways that you permit agencies to submit cases to DOJ?
>
> "A. Yes, we have a form that has to be filled out for controlled substance cases. That form is actually printed right on an envelope. So for controlled substance cases we like to have that – the controlled substances or suspected controlled substances placed inside that envelope and that form to be filled out."

Gallagher further testified that when items are submitted for testing, she begins with a color screening test and then conducts an instrumental analysis "to do determinative or confirmatory analysis."

The prosecutor then turned to the specific items that Gallagher tested.

> "Q So I will refer you to BFS Case Number CV167446. What agency did you receive that case from?

"[GALLAGHER]. The property department received that case from the Sonora Police Department.

"Q. Okay. Who were the subjects attached to that case?

"A. [Codefendant] Daniel Oliver and [defendant] Robert Reed.

"Q. What is the date of offense on that case?

"A. It was April 20th, 2016.

"Q. Now, attached to this case, did you test seven different substances?

"A. Yes, I did.

"Q. Okay. Were – when the substances come in to you, are they suspected to be a specific controlled substance sometimes?

"A. Sometimes, yes."

Gallagher testified she generated two reports about her tests of these items, dated September 19 and November 21, 2016.

"Q. Okay. In this case were there six packages that were suspected to be methamphetamine?

"A. Yes. *Whoever filled out the form,* the officer or the person dropped off the evidence, when they filled out the form, they wrote that they suspected or they indicated that it was meth. That's their suspicion.

"Q. Did you test these six separate suspected packages of methamphetamine?

"A. Yes, I did." (Italics added.)

Gallagher testified about the content and weight of each bag of methamphetamine, as set forth in the factual statement.

Gallagher next testified about the tablets:

"Q. Did you also test another substance?

"A. Yes, I also tested a tablet. There were 20 tablets submitted. I tested one of those tablets. It contained clonazepam."

Gallagher testified she did not weigh the tablet, but the inscription marked on it stated it was a one milligram clonazepam tablet.

On cross-examination, Gallagher testified that her report of September 19, 2016, stated that "item seven" was not analyzed at that time. "It was submitted to the laboratory later, and then I retested the item seven, so the agency resubmitted it last week and requested that I test item number seven," and she generated the second report that was dated November 21, 2016.

Gallagher testified that another item was submitted for testing, with the indication that it contained suspected marijuana, but the contents were not examined or tested.

C. Failure to Object

We first note that defendant did not object to any aspect of the trial testimony from either Gallagher or Sergeant Rogers about the chain of custody, processing or testing of the substances, or that the items were associated with defendant and codefendant Oliver. Ordinarily, "the failure to object to the admission of expert testimony or hearsay at trial forfeits an appellate claim that such evidence was improperly admitted. [Citations.]" (*People v. Stevens* (2015) 62 Cal.4th 325, 333.)

Defendant acknowledges that he did not raise this objection during Gallagher's testimony, but argues the issue has not been forfeited because *Sanchez* had just been decided and announced a new rule of law. *Sanchez* was decided on June 30, 2016. (*Sanchez, supra*, 63 Cal.4th 665.) Defendant's jury trial was held five months later in November 2016. Defendant did not object on the grounds of hearsay and has forfeited any *Sanchez* claim on appeal.

In the alternative, defendant argues his attorney was prejudicially ineffective for failing to raise hearsay objections to Gallagher's testimony. "In order to demonstrate ineffective assistance, a defendant must first show counsel's performance was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Second, he must show prejudice flowing from

counsel's performance or lack thereof. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 214–215 (*Williams*).)

"[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance. [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502.) The failure to raise a meritless objection is not ineffective assistance of counsel. (*People v. Bradley* (2012) 208 Cal.App.4th 64, 90.)

D. Defendant's Hearsay Contentions

Defendant argues that based on *Sanchez* and *Williams*, Gallagher's testimony that she tested substances that were associated with the names of defendant and codefendant Oliver constituted inadmissible testimony hearsay because Gallagher said an "unknown officer" had filled out the DOJ forms that accompanied the contraband and listed defendant's name, and defendant did not have the opportunity to confront or cross-examine that "unknown officer."

Defendant's argument is based on this limited portion of Gallagher's testimony: "*Whoever filled out the form*, the officer or the person dropped off the evidence, when they filled out the form, they wrote that they suspected or they indicated that it was meth. That's their suspicion." (Italics added.)

Gallagher's testimony, taken in a vacuum, may appear to fall within the type of hearsay found inadmissible in *Sanchez*. As set forth above, however, the entirety of the trial testimonies from both Gallagher and Sergeant Rogers refute defendant's hearsay contentions. Gallagher began her testimony by generally explaining how documents are prepared and items are submitted to the DOJ for testing. "[W]e have a form that has to be filled out for controlled substance cases. That form is actually printed right on an envelope. So for controlled substance cases we like to have that – the controlled

substances or suspected controlled substances placed inside that envelope and that form to be filled out."

Gallagher then testified that "BFS case number CV167446" was submitted from the Sonora Police Department to the DOJ's property department, the subjects were identified as defendant and codefendant Oliver, and it contained seven items for testing. Gallagher testified that she tested six bags, each bag contained methamphetamine, and stated the weights for each item. As she discussed the six bags of methamphetamine, the following exchange occurred:

> "[THE PROSECUTOR]: Okay. In this case were there six packages that were suspected to be methamphetamine?
>
> "A. Yes. *Whoever filled out the form,* the officer or the person dropped off the evidence, when they filled out the form, they wrote that they suspected or they indicated that it was meth. That's their suspicion."

Gallagher further testified that the seventh item consisted of a bag of pills, she tested one pill, and it contained clonazepam.

While Gallagher did not know who submitted the items to the DOJ, Sergeant Rogers's trial testimony supplies the answer. Rogers took possession of the contraband found in the pouch. Rogers testified that he took the contraband to the Sonora Police Department, conducted a field test, and then sealed the substances to submit to the DOJ for testing.

> "Q. Okay. After you tested it, did you also weigh the substances?
>
> "[ROGERS]. Yes.
>
> "Q. Okay. And after you do that, *do you then seal the substances in any way?*
>
> "A. *Yes.*
>
> "Q. Can you describe that?

"A. When you confiscate narcotics, they have to be placed into a specific envelope that the California Department of Justice supplies to departments. The reason being, all suspected controlled substances eventually get sent to the Department of Justice for examination and for testing. They – they are put into that—to that bag and then there's proper – there's procedures that they require before they receive the bag. There's portions of the bag that have to be filled out. There's certain information you as the booking officer writes on the bag. The bag is sealed with tape. Then you then initial the tape putting your initials half on the tape and envelope to show that seal is genuine, it's not been tampered with prior to the Department of Justice receiving it.

"Q. Part of the information, does it identify who the suspects were that the drugs were related to?

"A. Yes.

"Q. And does it have your case number?

"A. Yes." (Italics added.)

Sanchez held that an expert "*cannot* … relate as true case-specific facts asserted in hearsay statements, *unless they are independently proven by competent evidence* or are covered by a hearsay exception…." (*Sanchez, supra,* 63 Cal.4th at p. 686, first italics in original, second italics added.) *Sanchez* further held that "the evidence can be admitted through an appropriate witness …." (*Id*. at p. 684.) That is exactly what happened in this case. Gallagher testified the items were submitted for testing by the Sonora Police Department. She did not specifically identify who prepared and submitted the contraband to the DOJ or who wrote that the items were associated with the arrest of defendant and codefendant Oliver on April 20, 2016. However, Sergeant Rogers testified in detail about his collection, preservation, and transmittal of the contraband found in the stolen car to the DOJ. The entirety of the record reveals Rogers was the "unknown officer" who identified the items as being associated with defendant's arrest.

Defendant "anticipates" the argument that Sergeant Rogers testified that he prepared the DOJ form and submitted the items for testing. Defendant rejects this interpretation of Rogers' testimony for the following reasons:

> "Although Rogers testified about the procedures for sending suspected narcotics to the DOJ for testing, Rogers never testified that he was the officer who attested to the information on the DOJ form. Rather, Rogers testified that suspected narcotics 'have to be placed into a specific envelope that the California Department of Justice supplies to departments.' Rogers further testified that, under these procedures, the suspected narcotics are placed into 'that bag' and that, '[t]here's portions of the bag that have to be filled out. There's certain information you as the booking officer writes [sic] on the bag. The bag is sealed with tape. Then you then initial the tape putting your initials half on the tape and envelope to show that seal is genuine, it's not been tampered with prior to the Department of Justice receiving it.
>
> "At no point, however, did Rogers testify that he was the person who wrote the information on the bag or form that was sent to the Department of Justice. Gallagher likewise did not indicate the identity of the unknown officer who attested to the information on the DOJ form."

"An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 396.) Given defendant's failure to make any hearsay objections at trial, we find the logical inferences from the record are that Gallagher received from the Sonora Police Department six baggies of suspected methamphetamine, one bag with 20 pills, and a quantity of marijuana; and that Sergeant Rogers of the Sonora Police Department took possession of the contraband found in the stolen car – six baggies of suspected methamphetamine, a baggie with 20 pills, and a quantity of suspected marijuana – and he packaged the items in the manner required by the DOJ and transmitted the items to that agency for testing. Rogers testified at trial and was subject to cross-examination. While Rogers completed his testimony just before Gallagher's appearance, there is nothing in the record to indicate the court would have denied a defense motion to recall Rogers for further cross-examination. Gallagher's testimony did not violate *Sanchez* or *Crawford*.

II. The Criminalist's Testimony About Clonazepam

Defendant raises a similar argument about the criminalist's testimony regarding the test of the clonazepam pill and contends his conviction for possession of clonazepam

for sale must be reversed because the prosecution failed to prove that he possessed that drug. Defendant asserts that "[u]nlike the methamphetamine Gallagher tested, Gallagher did not provide any information regarding the DOJ form associated with the twenty tablets. No testimony was provided by Gallagher as to the agency that submitted the twenty tablets or the suspects associated with the twenty tablets. Gallagher effectively testified that she tested one of twenty tablets, submitted by an unknown law enforcement agency, that were associated with unknown suspects. At no point did Gallagher testify that the tablets were associated with [defendant]."

"When a defendant challenges the sufficiency of the evidence, ' "[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]' [Citations.] 'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. [Citation.]' [Citation.] We ' " 'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " [Citation.]' [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 942–943.)

We have already set forth the entirety of the testimony from Sergeant Rogers and Gallagher. As relevant to defendant's contentions about the bag of pills, Gallagher testified as follows:

> "Q So I will refer you to BFS Case Number CV167446. What agency did you receive that case from?
>
> "[GALLAGHER]. The property department received that case from the Sonora Police Department.
>
> "Q. Okay. Who were the subjects attached to that case?
>
> "A. [Codefendant] Daniel Oliver and [defendant] Robert Reed.
>
> "Q. What is the date of offense on that case?

"A. It was April 20th, 2016.

"Q. *Now, attached to this case, did you test seven different substances*?

"A. *Yes, I did*." (Italics added.)

Gallagher testified that she tested the six individual bags that contained methamphetamine.

"Q. Did you also test another substance?

"[GALLAGHER]. Yes, I also tested a tablet. There were 20 tablets submitted. I tested one of those tablets. It contained clonazepam."

As explained in part I, *ante*, the entirety of the record raises the logical inference that Sergeant Rogers preserved and transmitted to the DOJ the contraband found in the car, and he was the "unknown officer" who identified defendant and codefendant Oliver as being associated with the items. Gallagher testified that she received seven items for testing from the Sonora Police Department that were associated with defendant and codefendant Oliver: six bags that tested positive for methamphetamine, and one pill from the bag of 20 pills that contained clonazepam. Gallagher did not test the item identified as suspected marijuana, eliminating that item as one of the seven that she tested.

Gallagher further testified that she tested the seventh item at a separate time from the methamphetamine. "It was submitted to the laboratory later, and then I retested the item seven, so the agency resubmitted it last week and requested that I test item number seven," and she generated the second report that was dated November 21, 2016. However, there is nothing in Gallagher's testimony to refute the inference that the bag of pills was part of the package of evidence submitted to the DOJ that was identified with defendant and codefendant Oliver, and that she tested "seven different substances" that were "attached to this case."

We find the entirety of the evidence and the inferences thereon establish that the bag of pills was submitted to the DOJ along with the methamphetamine by Sergeant

Rogers; Rogers identified the items as being associated with defendant and codefendant Oliver; and Gallagher tested one of the pills from the bag, and it was positive for clonazepam.

III. Failure to Instruct on Lesser Included Offenses

Defendant was charged and convicted of count III, possession for sale of a controlled substance, methamphetamine; and count IV, possession for sale of a designated controlled substance, clonazepam. The jury was not instructed on any lesser included offenses for these charges.

Defendant contends the court had a sua sponte duty to instruct on simple possession of methamphetamine and clonazepam as lesser included offenses of counts III and IV, and the error was prejudicial and requires reversal.

A. Lesser Included Offenses

"A trial court has a sua sponte duty to instruct the jury on a lesser included uncharged offense if there is substantial evidence that would absolve the defendant from guilt of the greater, but not the lesser, offense. [Citation.] Substantial evidence is evidence from which a jury could conclude beyond a reasonable doubt that the lesser offense was committed. [Citations.] Speculative, minimal, or insubstantial evidence is insufficient to require an instruction on a lesser included offense. [Citations.]" (*People v. Simon* (2016) 1 Cal.5th 98, 132.) "We review de novo a trial court's decision not to give an imperfect self-defense instruction. [Citations.]" (*Id.* at p. 133.)

"[T]he failure to instruct sua sponte on a lesser included offense in a noncapital case is, at most, an error of California law alone, and is thus subject only to state standards of reversibility. [S]uch misdirection of the jury is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 165, citing *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

"Further, the *Watson* test for harmless error 'focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.' [Citations.]" (*People v. Beltran* (2013) 56 Cal.4th 935, 956, original italics.)

B. Simple Possession and Possession for Sale

Simple possession of a controlled substance is generally a lesser included offense of the crime of possession of the same contraband for purposes of sale. (See, e.g., *People v. Becker* (2010) 183 Cal.App.4th 1151, 1157; *People v. Oldham* (2000) 81 Cal.App.4th 1, 16; *People v. Walker* (2015) 237 Cal.App.4th 111, 115–116; *People v. Adams* (1990) 220 Cal.App.3d 680, 690; *People v. Magana* (1990) 218 Cal.App.3d 951, 954.)

However, a defendant "is entitled to instructions on lesser included offenses only if some basis exists, 'other than an unexplainable rejection of prosecution evidence, on which the jury could find the offense to be less than that charged.' [Citations.] '[I]f there is no proof, other than an unexplainable rejection of the prosecution's evidence, that the offense was less than that charged, such instructions shall not be given.' [Citation.]" (*People v. Walker*, *supra*, 237 Cal.App.4th at p. 117.)

Defendant contends that the court had a sua sponte duty in this case to instruct on simple possession of both methamphetamine and clonazepam as lesser included offenses of the charged crimes of possession of those same narcotics for sale. Defendant's argument is based on *People v. Saldana* (1984) 157 Cal.App.3d 443 (*Saldana*).) In that case, officers arrived at a house to execute a search warrant for the defendant's brother. There were several members of the defendant's family in the house. When the officers arrived, they found the defendant lying on his mother's bed in a room he shared with her. He reached inside the headboard, and the officers immediately took him into custody.

The officers found 18 balloons of heroin inside the headboard. The defendant's brothers were in the basement; one brother was under the influence of heroin when officers arrived, and he was a known user and seller of heroin. The police found materials related to both sales and use in the basement. The defendant denied any knowledge of the heroin, and it was established that he did not use heroin. There was contradictory testimony from family members about who might have been using heroin in that house. The defendant was charged and convicted of possession of heroin for sale. The jury was instructed that joint or constructive possession was sufficient to prove the possession element of possession for sale, but it was not instructed on simple possession. (*Id*. at pp. 450–453, 455.)

Saldana held the trial court had a sua sponte duty to instruct on the lesser included offense of simple possession of heroin, and the instructional error was prejudicial because there had been sufficient evidence for the jury to consider the alternative charge. (*Saldana*, *supra*, 157 Cal.App.3d at p. 453.) The court held that where there is direct evidence of simple possession, but only circumstantial evidence of intent to sell, a jury must be instructed on both simple possession and possession for sale. *Saldana* noted that some of the balloons found in the headboard were cut open, raising the inference that the heroin was for the brother's personal use since he was a known user, and the defendant may have been holding the drugs for him. (*Id*. at pp. 456–458.)

In *People v. Walker*, *supra*, 237 Cal.App.4th 111, the court held an instruction should have been given for simple possession of marijuana to the charged offense of possession of marijuana for sale, because the police did not observe any sales activities or find scales or documents to indicate sales activity; the defendant possessed a medical marijuana card and claimed the marijuana was for his own personal medical use; and the other evidence did not compel the conclusion of his intent to sell. (*Id*. at p. 117.)

In *People v. Douglas* (1987) 193 Cal.App.3d 1691, the court held the failure to instruct on simple possession as a lesser included offense of possession for sale was not

prejudicial where the defendant was found in possession of 14 individual baggies of marijuana in an area known for drug trafficking. (*Id*. at pp. 695–1696.)

In *People v. Goodall* (1982) 131 Cal.App.3d 129, the defendant was charged with possession of PCP for sale. The court held a simple possession instruction was not required because the police found the defendant in possession of a large amount of liquid PCP that was enough to dip thousands of PCP cigarettes, the prosecution introduced expert testimony that the PCP was possessed for sale, and the evidence was not contradicted. (*Id*. at pp. 138, 145.)

C. Analysis

Defendant asserts that his case is identical to the situation in *Saldana*, and the trial court had a sua sponte duty to instruct on simple possession as lesser included offenses to possession for sale of both methamphetamine and clonazepam. Defendant argues:

> "[Defendant], like the defendant in *Saldana*, was not the only person who had access to the narcotics at issue. Indeed, the methamphetamine was found in a pouch hanging underneath the front passenger seat, where co-defendant Oliver sat. [Citation.] Thus, like the jury in *Saldana*, the jury in [defendant's] case could have inferred that the methamphetamine was possessed by Oliver for the purpose of sale. Like the defendant in *Saldana*, [defendant] admitted to possessing marijuana found in a different location, but denied knowing of the methamphetamine concealed underneath Oliver's seat. [Citation.] And, like the defendant in *Saldana*, 'the prosecution's evidence was purely circumstantial that [the defendant] was a nonuser and in the detectives' expert opinions the narcotics were packaged for sale.' [Citation.]"

Defendant asserts that it is impossible to determine whether the jury could have found he simply possessed the narcotics without the intent to sell. "The jury may have believed it was faced with an all or nothing verdict," and felt compelled to convict him of the charged offenses.

Even if simple possession instructions should have been given, it is not reasonably probable that, if given the choice between the greater and lesser offenses, the jury would have convicted defendant only of the lesser offenses. (*People v. Breverman*, *supra*, 19

Cal.4th at p. 178, fn. 25.) Contrary to defendant's arguments, the jury was not given an all or nothing choice in this case.

Defendant claimed he went to Danny's house with codefendant Oliver, he had just picked up the car from Danny, and he did not know it was stolen. The pouch with the methamphetamine and clonazepam was found under the front passenger seat, where codefendant Oliver was sitting. Defendant claimed he did not know about the drugs under the seat. Defendant possessed over $1,000 cash in different denominations. The prosecution's expert testified without contradiction that the methamphetamine and clonazepam were possessed for purposes of sale based on the quantities and packaging.

Defendant and Oliver were jointly charged with the same drug offenses. The jury had four alternatives. It could have found that Oliver solely possessed for sale the large amount of narcotics in the pouch, since the pouch was found under the seat where he was sitting. The jury could have found defendant and Oliver jointly possessed the drugs for sale. A third alternative would have been to find both defendant and Oliver not guilty if the jury believed that Danny or someone else left the drugs in the stolen car. Instead, the jury found Oliver not guilty of all charges and convicted defendant of the drug offenses.

It is not reasonably probable that defendant would have been convicted only of simple possession if the jury had been so instructed on counts III and IV.

IV. Probation Condition for Alcohol Testing

As part of the terms and conditions of probation, the court ordered defendant not to possess any controlled substance without a prescription from a medical doctor; not to possess any drug paraphernalia; to register as a narcotics offender; and to submit to drug and/or alcohol testing at the direction of the probation officer or at the request of any peace officer.

Defendant contends the order for him to submit to alcohol testing is unreasonable pursuant to *People v. Lent* (1975) 15 Cal.3d 841 (*Lent*) and must be stricken because he was only convicted of drug-related offenses in this case.

Defendant did not object to any of the conditions of probation, even though the conditions were set forth in the probation report that was received by the defense prior to sentencing and subsequently followed by the superior court at the sentencing hearing. "In general, the failure to make a timely objection to a probation condition forfeits the claim of error on appeal. [Citations.] 'A timely objection allows the court to modify or delete an allegedly unreasonable condition or to explain why it is necessary in the particular case. The parties must, of course, be given a reasonable opportunity to present any relevant argument and evidence.' [Citation.] An objection may be raised for the first time on appeal only where it concerns an unauthorized sentence involving pure questions of law. [Citations.]" (*People v. Relkin* (2016) 6 Cal.App.5th 1188, 1194–1195.)[4]

Defendant's appellate challenge is based on *People v. Kiddoo* (1990) 225 Cal.App.3d 922 (*Kiddoo*) (overruled on other grounds in *People v. Welch* (1993) 5 Cal.4th 228, 236–237), where the defendant, who was 33 years old at the time, pleaded guilty to possession of methamphetamine. He was placed on probation on condition of alcohol testing. The defendant told the probation officer that he had become involved in the sale of drugs to support a gambling habit; he had used marijuana, methamphetamine, amphetamine, cocaine, and alcohol since he was 14 years old; he had " 'no prior problem;' " and he was a social drinker and sporadically used methamphetamine. The defendant's prior record consisted of unlawfully taking or driving a vehicle when he was a teenager and possession of marijuana when he was 22 years old. (*Kiddoo, supra,* 225 Cal.App.3d at p. 927.)

Kiddoo held the condition for alcohol testing was invalid because it was not related to the crime of possession or the defendant's future criminality. *Kiddoo* explained

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[4] A constitutional challenge to a condition of probation may not be forfeited under certain circumstances. (See, e.g., *In re Sheena K.* (2007) 40 Cal.4th 875, 887.) However, defendant's appellate objections to the alcohol testing condition are limited to whether that condition was reasonable under *Lent*.

that nothing in the defendant's record suggested alcohol was related to his current convictions. *Kiddoo* further held that since it was not a crime to possess or consume alcohol, or to frequent places where alcoholic beverages were the chief item of sale, the probation condition had to be reasonably related to future criminal activity in order to be valid. The court found no factual indication in the record that, in the defendant's case, the proscribed behavior was reasonably related to future criminal behavior. (*Kiddoo, supra,* 225 Cal.App.3d at pp. 927–928.)

As noted by the Attorney General (RB 30-31), *Kiddoo* has been repeatedly criticized. For example, in *People v. Beal* (1997) 60 Cal.App.4th 84, the court perceived several flaws in *Kiddoo's* rationale:

> "[W]e disagree with the fundamental assumptions in *Kiddoo* that alcohol and drug abuse are not reasonably related and that alcohol use is unrelated to future criminality where the defendant has a history of substance abuse. [Citation.]
>
> "Rather, empirical evidence shows that there is a nexus between drug use and alcohol consumption. It is well documented that the use of alcohol lessens self-control and thus may create a situation where the user has reduced ability to stay away from drugs. [Citation.] Presumably for this very reason, the vast majority of drug treatment programs … require abstinence from alcohol use. [Citation.]
>
> "Based on the relationship between alcohol and drug use, we conclude that substance abuse is reasonably related to the underlying crime and that alcohol use may lead to future criminality where the defendant has a history of substance abuse and is convicted of a drug-related offense. Whether the trial court determines to impose such a condition is thus within its sound discretion and, if it does, the defendant must either submit to the condition or, if she considers the condition 'more harsh than the sentence the court would otherwise impose, [exercise] the right to refuse probation and undergo the sentence.' [Citations.] That the use of alcohol is not otherwise illegal does not render the defendant's decision to accept such a condition subject to challenge on appeal. [Citation.]" (*People v. Beal, supra,* 60 Cal.App.4th at p. 87; see also *People v. Malago* (2017) 8 Cal.App.5th 1301, 1308; *People v. Balestra* (1999) 76 Cal.App.4th 57, 69.)

Even if we were to consider defendant's arguments based on *Kiddoo*, our review of the record before the superior court suggests the reasons it ordered defendant to comply with alcohol testing. Defendant admitted to the probation officer that he occasionally used both alcohol and marijuana. Defendant also told the probation officer he had participated in domestic violence counseling, attended "12 Step" meetings, and was willing to participate in counseling as a condition of probation. Defendant's prior convictions included domestic violence offenses in 1999 and 2004 (Pen. Code, § 273.5, subd. (a)); and several convictions for driving on a suspended license, including one for violating Vehicle Code section 14601.2, subdivision (a) in 2003, driving on a suspended license after being convicted of violating Vehicle Code sections 23152 or 23153, driving under the influence.[5] The court did not abuse its discretion when it imposed the condition for alcohol testing.

V. Search Condition

As another term of probation, the court imposed a search condition for defendant to "[s]ubmit your person and property, including any residence, premises, container, electronic device, or vehicle under your control to search and seizure at any time of the day or night by any law enforcement or probation officer with or without a warrant."

Defendant contends the search condition is overly broad because "it implicates [his] constitutional right to be free of unreasonable search and seizure and is not limited to searches for material prohibited by law or other evidence of illegal conduct." Defendant further argues the search condition improperly includes electronic devices.[6]

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[5] Defendant acknowledges the probation reports lists this 2003 offense but asserts the report fails to identify when he was convicted of driving under the influence. As noted above, however, defendant never objected to any of the information or recommendations in the probation report and has waived his challenge on this point.

[6] The probation report recommended a general search condition to "[s]ubmit your person and property, including any residence, premises, container, electronic device, or vehicle under your control to search and seizure at any time of the day or night by any law enforcement or probation officer with or without a warrant."

As explained in part IV, *ante*, defendant did not object to any of the terms and conditions of probation. His challenge to the search condition, however, is based on the argument that it is unconstitutionally vague and/or overly broad. A constitutional challenge to a condition of probation is not forfeited if it raises a facial challenge, i.e., "a challenge to a term of probation on the ground of unconstitutional vagueness or overbreadth that is capable of correction without reference to the particular sentencing record developed in the trial court *can* be said to present a pure question of law." (*In re Sheena K., supra,* 40 Cal.4th at p. 887, original italics.) "Although a probation condition may be overbroad when considered in light of all the facts, only those constitutional challenges presenting a pure question of law may be raised for the first time on appeal. [Citation.] [N]ot all constitutional defects in conditions of probation may be raised for the first time on appeal; some questions cannot be resolved without reference to the particular sentencing record developed in the trial court. [Citation.]" (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1347.)

Defendant's contentions about the search conditions appear to raise facial challenges to whether the conditions are constitutional.

A. Validity of Search Conditions

"Generally speaking, conditions of probation 'are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large. [Citation.] These same goals require and

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At the sentencing hearing, the court verbally stated this particular condition as submitting "his person and property including residence to search," without going into the same detail or including electronic devices. At the conclusion of the sentencing hearing, the court stated that defendant had signed the order that set forth the terms and conditions of probation. The court's written order states that defendant was ordered to "[s]ubmit your person and property, including any residence, premises, container, electronic device, or vehicle under your control to search and seizure at any time of the day or night by any law enforcement or probation officer with or without a warrant." Defendant signed this form and acknowledged that he understood the terms and conditions of probation.

justify the exercise of supervision to assure that the restrictions are in fact observed.' [Citation.] For example, probation conditions authorizing searches 'aid in deterring further offenses … and in monitoring compliance with the terms of probation. [Citations.] By allowing close supervision of probationers, probation search conditions serve to promote rehabilitation and reduce recidivism while helping to protect the community from potential harm by probationers.' [Citation.] A condition of probation that enables a probation officer to supervise his or her charges effectively is, therefore, 'reasonably related to future criminality.' [Citations.]" (*People v. Olguin* (2008) 45 Cal.4th 375, 380–381.)

A warrantless search condition "is intended to ensure that the [probationer] is obeying the fundamental condition of all grants of probation, that is, the usual requirement … that a probationer 'obey all laws.' " (*People v. Balestra*, *supra*, 76 Cal.App.4th at p. 67.) This is true "even if [the] condition … has no relationship to the crime of which a defendant was convicted ...." (*People v. Olguin, supra,* 45 Cal.4th at p. 380.)

The purpose of requiring Fourth Amendment search waivers as a condition of probation and parole is "to determine not only whether [the offender] disobeys the law, but also whether he obeys the law. Information obtained [from an unexpected and unprovoked search] afford[s] a valuable measure of the effectiveness of the supervision given the defendant ...." (*People v. Olguin*, *supra*, 45 Cal.4th at p. 382.)

To the extent defendant challenges the validity of the basic search conditions for his person and property, such conditions have repeatedly been found reasonable and constitutional. (See, e.g., *People v. Ramos* (2004) 34 Cal.4th 494, 505–506; *People v. Middleton* (2005) 131 Cal.App.4th 732, 739; *People v. Reyes* (1998) 19 Cal.4th 743, 753; *People v. Bravo* (1987) 43 Cal.3d 600, 607.) " '[W]hen defendant in order to obtain probation specifically agreed to permit at any time a warrantless search of his person, car

and house, he voluntarily waived whatever claim of privacy he might otherwise have had.' [Citations.]" (*People v. Ramos*, *supra*, 34 Cal.4th at p. 506.)

B. Electronic Search Condition

The search condition in this case also required defendant to submit any "electronic device" to search and seizure. Defendant relies on a series of federal and state rulings and argues the electronic search condition is unconstitutional because it is vague and overly broad.

In *Riley v. California* (2014) __ U.S. __ [134 S.Ct. 2473] (*Riley*), the court held that the search incident to arrest exception to the warrant requirement did not apply to searches of data on a cell phone seized from an arrestee. (*Id.* at p. 2485.) *Riley* explained the ordinary justifications for searches incident to arrest were to prevent harm to officers and destruction of evidence, but there were "no comparable risks when the search is of digital data." (*Ibid.*) "Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon – say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one." (*Ibid.*)

Riley contrasted the government's interests with the heightened privacy interests that people have in their cell phone data. *Riley* compared cell phones to "minicomputers," and noted both the volume of sensitive data they contain and the pervasiveness of cell phone usage. (*Riley, supra*, 134 S.Ct. at p. 2489.) Cell phone data is "qualitatively different" (*id*. at p. 2490) from physical records and could include information like location data or Internet browsing history, that would "typically expose to the government far *more* than the most exhaustive search of a house." (*Id.* at p. 2491, original italics.)

> "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life,' [citation]. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple –get a warrant." (*Id.* at pp. 2494–2495.)

Riley reversed and remanded the case but emphasized that its holding was only that cell phone data is subject to Fourth Amendment protection, "not that the information on a cell phone is immune from search." (*Riley, supra*, 134 S.Ct. at p. 2493.) "Even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone," such as the exigent circumstances exception. (*Ibid.*)

In *Carpenter v. United States* (2018) __ U.S. __ [138 S.Ct. 2206] (*Carpenter*), the police arrested four men who were suspecting of committing several robberies. One of the men provided the police with cell phone numbers for other accomplices. Based on this information, the FBI applied for and obtained court orders under the Stored Communications Act to obtain cell phone records for the suspected accomplices from wireless carriers, that showed location-related data obtained from their cell phones. The orders were issued under the statute and not pursuant to a search warrant. (*Id.* at pp. 2212–2213.)

Carpenter held the orders were invalid because the statute only required the government to show "reasonable grounds" to believe the records were relevant to an ongoing investigation. (*Carpenter*, *supra*, 138 S.Ct. at p. 2212) "[T]his Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy." (*Id.* at p. 2221.) "If the choice to proceed by subpoena provided a categorical limitation on Fourth Amendment protection, no type of record would ever be protected by the warrant requirement." (*Id.* at p. 2222)

Carpenter rejected the government's arguments that the information was rendered less private because it was part of business records or because, by using the cell phone, the individual had technically disclosed the location information to the wireless carrier. *Carpenter* acknowledged its previous holding in *Riley* and the "unique nature of cell phone location records." (*Carpenter, supra,* 138 S.Ct. at p. 2217.) *Carpenter* concluded "that the Government must generally obtain a warrant supported by probable cause before acquiring such records." (*Id.* at p. 2221.)

In *People v. Appleton* (2016) 245 Cal.App.4th 717 (*Appleton*), the defendant was charged with sex offenses committed on a minor that he met on social media. He later pleaded guilty to false imprisonment by means of deceit and was placed on probation. One of the probation conditions was for his electronic devices to be subject to " 'forensic analysis search for material prohibited by law.' " (*Id.* at p. 721.) *Appleton* held the search condition was valid under *Lent* because it was reasonably related to his crime. However, it was unconstitutionally overly broad under *Riley* because it allowed "for searches of vast amounts of personal information unrelated to defendant's criminal conduct or his potential future criminality," (*Appleton*, *supra*, at p. 727) such as his medical and financial records, "personal diaries, and intimate correspondence with family and friends." (*Id.* at p. 725.)

In *United States v. Lara* (9th Cir. 2016) 815 F.3d 605, 610, the court held a probation condition for search of "person and property, including any residence, premises, container or vehicle under [his] control" did not include cell phone data.

In *People v. Sandee* (2017) 15 Cal.App.5th 294 (rev. den.) (*Sandee*), the defendant was on probation and subject to a search condition for her property and personal effects. An officer stopped the defendant after she left a house that was under surveillance for drug activity. The officer confirmed the search condition, searched her cell phone, and found text messages that were possibly related to drug sales. (*Id.* at pp. 298–299.)

Sandee held the defendant's suppression motion was properly denied and the officer's search of the cell phone was valid under the probation search condition.

> "[A]t the time the search was conducted a reasonable, objective person would understand it to encompass a search of [defendant's] cell phone. In the probation search condition, [defendant] agreed to submit her 'property' and 'personal effects' to search at any time. The probation search condition is worded very broadly and contains no language whatsoever that would limit the terms 'property' and 'personal effects' to exclude [defendant's] cell phone or other electronic devices and the data stored on them. As a cell phone is indisputably the property of the person who possesses it and constitutes part of his or her personal effects, a reasonable person would understand the terms 'property' and 'personal effects' to include [the defendant's] cell phone and the data on it." (*Sandee, supra,* 15 Cal.App.5th at p. 302, fn. omitted.)

Sandee rejected the Ninth Circuit's holding in *Lara* because it "did not follow the approach normally employed by the California Supreme Court in assessing the validity of a search conducted pursuant to a probation search condition, under which the probationer is understood to have consented to all searches within the scope of the probation search condition, as interpreted on an objective basis. [Citation.]" (*Sandee, supra,* 15 Cal.App.5th at p. 302.) *Sandee* acknowledged *Riley* but concluded there was nothing in *Riley* to suggest that cell phones "should *not* be understood as a *type* of personal property" within the scope of a probation search. (*Sandee, supra,* at p. 302, fn. 5, original italics.)

C. Analysis

Defendant contends the electronic search condition is unconstitutionally vague and overbroad. Neither *Riley* nor *Carpenter* addressed the constitutionality of search conditions imposed pursuant to probation or parole. The defendants in those cases had not been convicted of crimes at the time of the searches, and *Riley* acknowledged that there could be circumstances where a warrantless search of electronic devices would be valid. Neither *Riley* nor *Carpenter* are applicable to defendant's case.

"Warrantless searches are justified in the probation context because they aid in deterring further offenses by the probationer and in monitoring compliance with the terms of probation. [Citations.] By allowing close supervision of probationers, probation search conditions serve to promote rehabilitation and reduce recidivism while helping to protect the community from potential harm by probationers. [Citation.]" (*People v. Robles* (2000) 23 Cal.4th 789, 795.)

This case is fundamentally different than *Riley* since a defendant has a significantly diminished expectation of privacy as a probationer, and the government has a greater interest to protect the safety of the public from future criminal offenses committed by probationers.

While searches involving electronic devices may raise unique issues of privacy not found in searches of these more traditional categories, there is no reason to depart from the well-recognized treatment of search conditions when that condition implicates electronic devices. Indeed, a person's home also contains considerable personal and confidential information and is a place where a person has the absolute right to be left alone, but conditions which grant broad authority to search the home of a probationer or parolee without a warrant or reasonable cause have been upheld. (*People v. Reyes*, *supra*, 19 Cal.4th at pp. 746, 754; *People v. Ramos*, *supra*, 34 Cal.4th at 494, 505–506; *In re Binh L.* (1992) 5 Cal.App.4th 194, 203–205; *People v. Balestra*, *supra*, 76 Cal.App.4th at pp. 66–68; see also *United States v. Mitchell* (11th Cir. 2009) 565 F.3d 1347, 1351, 1352 [comparing "the hard drive of a computer" to the " 'the digital equivalent of its owner's home, [as] capable of holding a universe of private information' "].)

In the absence of further guidance from the United States or California Supreme Court, we agree with the analysis in *Sandee* that the inclusion of a search condition for electronic devices is not vague or overly broad based on defendant's limited expectation

of privacy. We find the state's interest in preventing future criminal behavior justified the search conditions imposed in this case, and they are not unconstitutional under *Riley*.[7]

DISPOSITION

The judgment is affirmed.

_____
POOCHIGIAN, Acting P.J.

WE CONCUR:

_____
DETJEN, J.

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PEÑA, J.

[7] There are several cases pending before the California Supreme Court regarding the reasonableness and constitutionality of electronic search conditions, and there is a split of authority in those cases regarding the validity of such conditions. (See, e.g., *People v. Trujillo* (2017) 15 Cal.App.5th 574, 223 Cal.Rptr.3d 268, review granted Nov. 29, 2017, S244650; *In re R.S.* (2017) 11 Cal.App.5th 239, 219 Cal.Rptr.3d 665, review granted July 26, 2017, S242387; *People v. Bryant* (2017) 10 Cal.App.5th 396, 215 Cal.Rptr.3d 740, review granted June 28, 2017, S241937; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, 207 Cal.Rptr.3d 855, review granted Dec. 14, 2016, S238210; *In re J.E.* (2016) 1 Cal.App.5th 795, 205 Cal.Rptr.3d 28, review granted Oct. 12, 2016, S236628; *In re A.S.* (2016) 245 Cal.App.4th 758, 200 Cal.Rptr.3d 100, review granted May 25, 2016, S233932; *In re Mark C.* (2016) 244 Cal.App.4th 520, 197 Cal.Rptr.3d 865, review granted Apr. 13, 2016, S232849; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, 196 Cal.Rptr.3d 651, review granted Mar. 9, 2016, S232240; *In re Ricardo P.* (2015) 241 Cal.App.4th 676, 193 Cal.Rptr.3d 883, review granted Feb. 17, 2016, S230923; *In re Patrick F.* (2015) 242 Cal.App.4th 104, 194 Cal.Rptr.3d 847, review granted Feb. 17, 2016, S231428.)